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NATURAL LAW AS A LIMITATION ON LEGISLATIVE AUTHORITY. — Probably the nearest approach in this country to a flat ruling that the authority of a legislature is limited by principles of "natural law" was recently handed down by Surrogate Fowler of New York County. The legislature had enacted that under certain circumstances the real property of an intestate should descend to the heirs of the deceased husband or wife of the intestate, as the case may be, and that the persons thus entitled to inherit "shall be deemed to be the heirs of such intestate."[1] "What does this statute mean?" asks the Surrogate. "It cannot, I think, be supported as an attempt to raise up a new class of heirs at law. It is an old principle of our common law 'that God only, and not man, can make an heir at law.' Glanvill VII, 1. . . . It is a principle of American public law that our legislatures cannot enact any law contrary to 'natural right.' . . . In this respect our public law continues the better traditions of the law of English-speaking people. . . . I do not in reality ascribe to the Legislature any such fatuity as an attempt by the act under consideration to raise up a new class of heirs at law to . . . any man or woman dying seised of real property." And so the statute was construed as an assignment of the state's right of escheat, and the assignees of this right were denied standing in court to contest the will of the deceased on the ground that the will could not have

[1] NEW YORK, DECEDENT ESTATE LAW, § 91.

been attacked by the state. *Matter of the Estate of Mrs. Frank Leslie*, 92 Misc. (N. Y.) 663.

The court's assumption that a state would have no standing in court to contest a will in order to advance its escheat seems doubtful. The considerations of public policy hinted at are difficult to perceive. No authority is cited for the proposition; a New York case *contra* appears to have been overlooked.[2]

As to the limitation on legislative power: The extract quoted from Glanville, whatever its value were the construction put upon it correct, has no application here. For when Glanville wrote, "Thus a man may give, in his lifetime, the whole of his purchased Land; but he cannot make any one his Heir to it, neither a College, nor any particular individual, it being an Established Rule of Law, that God alone, and not Man, can make an Heir,"[3] he was merely enunciating the early English law of his day that real property could not be transmitted by will.[4] Thus, save for a reference to one of the legal curiosities of the 17th century,[5] admittedly no longer law, this novel curtailment of legislative power seems to rest upon the court's intuition — for Judge Fowler would have law an art and not a science[6] — as to the extent of mortal capacity for law making.[7] In 1871 a dissenting justice wished to declare invalid a divorce statute. But he, at least, relied upon the authority of the Bible, saying: "In this authority, from which every well defined right of person and property is derived, we find — Matthew, ch. 19, verses 3 to 10 inclusive — the law of divorce stated. . . . Now I must elect between a statutory regulation demoralizing in its every influence and tendency, encouraging a system of kin to free-loveism, and an express divine law. I do not hesitate to disregard the one [the statute] and to observe the other [the Bible]."[8]

The conception of a natural or universal law limiting the authority of legislatures was prevalent among the pages of our early reporters. Introduced into this country by students of the continental law-of-nature school,[9] its popularity lay in an identification with the principles

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[2] Gombault *v.* Public Administrator, 4 Bradf. Sur. (N. Y.) 226, approved in Matter of Davis, 182 N. Y. 468, 474. And see 21 HARV. L. REV. 452.

[3] GLANVILLE, VII, 1.

[4] This meaning is obvious upon a consideration of more than the brief extract quoted by Surrogate Fowler. It will be remembered that Glanville's work was published between 1187 and 1189, and that the Statute of Wills, allowing testamentary disposition of land for the first time since the Norman Conquest, was not enacted until 1540. Note, too, that the word "heredem" (accusative of "heres") used by Glanville, who wrote in Latin, is applicable as well to one who takes by will as by intestacy. F. O., LAW FRENCH AND LAW LATIN DICTIONARY, *sub. tit.*, heir.

[5] In the reign of James I, Lord Chief Justice Hobart said: "Even an Act of Parliament, made against natural Equity, . . . is void in itself, for *jura naturae sunt immutabilia* and they are *leges legum*." Day *v.* Savadge, Hob. 85, 87. The Surrogate regrets that "this great principle . . . has disappeared from the law of England."

[6] See Fowler, "The Future of the Common Law," 13 COL. L. REV. 595, 603.

[7] It has never been supposed that the legislative alteration of rules of descent, prior to the vesting of an estate upon the death of an intestate, was limited by constitutional restraints. See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 512.

[8] Lanier *v.* Lanier, 5 Heisk. (Tenn.) 462, 471–2.

[9] See 1 WARREN, HISTORY OF THE HARVARD LAW SCHOOL, 53, 136, 144, 145, 149, 150, 169, etc. And observe, for example, citation of Grotius, Pufendorf, and Bynkershoeck in Gardner *v.* Newburgh, 2 Johns. Ch. 162, 166; of Pufendorf, Montes-

of liberty by which the colonial revolt against England was justified.[10] Justice Chase said: "An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."[11] Chief Justice Marshall, although deciding the case of *Fletcher* v. *Peck* as governed by the contract clause of the Constitution, inclined to the view that the doctrine that a *bonâ fide* purchase for value cuts off all equities was so fundamental as to be a part of a universal law binding even on legislatures.[12] And Justice Johnson, expressly rejecting the application of the Constitution to the case, concurred "on general principle, on the reason and nature of things: a principle which will impose laws even on the deity."[13] Justice Iredell, however, definitely repudiated any such doctrine, recognizing it as the mere imposition of judicial judgment upon legislatures, judgments of individual judges "regulated by no fixed standard."[14]

But although a standard of eternal principles derived from personal intuitions, as are the principles of natural law, is "no fixed standard,"[15] yet generally intuitive notions of justice identify right with custom. And so it is no mere coincidence that the eternal principles of natural right which came to be expounded in this country were, in the main, none other than the familiar doctrines of the common law. Thus Chief Justice Marshall thought the principles of English equity jurisprudence eternal truths.[16] And Surrogate Fowler, in the principal case, seeks to immortalize that procedure of descent to which he is accustomed.[17] It has been said that the right to compensation for lands taken

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quieu, and Vattel in Sinnickson *v.* Johnson, 17 N. J. L. 129, 145; and of Grotius, Pufendorf, Bynkershoeck, and Vattel, 2 Kent, Commentaries, 339, n. f. For an account of the unpopularity of the English common law at this time as an influence in turning American thought to French jurists, see Prof. Pound, "The Influence of French Law in America," 3 ILL. L. REV. 354.

[10] See Otis' argument in Paxton's Case, Quincy's Rep. 520 *et seq.* 1 THAYER, CASES ON CONSTITUTIONAL LAW, 48. The unpopularity of the common law because of its English origin was a contributing factor. See 1 WARREN, HISTORY OF THE HARVARD LAW SCHOOL, c. IX, and Prof. Pound, "The Influence of French Law in America," 3 ILL. L. REV. 354.

[11] Calder *v.* Bull, 3 Dall. (U. S.) 386, 388.

[12] Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 133.

[13] *Id.*, 143.

[14] Calder *v.* Bull, 3 Dall. (U. S.) 386, 398–9.

[15] Thus Justice Miller considered a juggling with marital relations on the part of a legislature contrary to natural law. See Loan Ass'n *v.* Topeka, 20 Wall. (U. S.) 655, 663. But not so Lord Holt, who would, however, have declared void a legislative act making a person a judge in his own cause. See City of London *v.* Wood, 12 Mod. 669, 687–8. Chief Justice Marshall, however, was not concerned over a legislature being its own judge, but over its failure to be guided by principles of equity. See Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 133.

As to diversity of opinion on the relation of slavery and liquor to natural law, see Prof. Pound, "Liberty of Contract," 18 YALE L. J. 454, 468, n. 79. And note the idea of a right of privacy, the existence of which many courts deny, as "derived from natural law" and having "its foundation in the instincts of nature . . . recognized intuitively, consciousness being the witness that can be called to prove its existence." Pavesich *v.* New England Life Ins. Co., 122 Ga. 190, 194, 50 S. E. 68, 69–70.

[16] See n. 12, *supra*.

[17] That the law of descent is particularly ill adapted to any conception of divine origin or universal basis may explain apparent lack of precedent for the doctrine of the principal case. Arising out of the exigencies of a feudal system, even the English law of descent was not uniform. *Cf.* the special practices of "gavelkind" and "bur-

by eminent domain "is operative as a principle of universal law; and the legislature of this State can no more take private property for public use, without just compensation, than if this restrainting principle were incorporated into and made a part of its State constitution." [18] (This was before the passage of the Fourteenth Amendment.) And a Wisconsin court has conceived the right to transmit property by will to inhere in nature.[19] When these ideas of natural right were inherited by non-philosophizing jurists, men "with little time for philosophic tangles," though each with "his own philosophy of law," [20] this doctrine became almost a subconscious legal philosophy, little more than a temperamental opposition to change, intellectualized — that is, justified by reasoning — and grafted on to constitutional limitations when occasion demanded. And so many a decision restricting a legislature in its attempt to meet the actualities of a present civilization has as a background this old notion of a natural law, a universal, unchanging order of things based on those conceptions known to the common law of the past.[21] But such decisions are based on constitutional construction. The idea of a natural limitation to legislative authority is now thoroughly obsolete,[22] and has long since been expressly repudiated by the New

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rough English." See 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, 269, 277. But Austin says the laws of God are universal. See 1 AUSTIN, JURISPRUDENCE, 84–5. In this country rules of descent have always been legislative. "The distinguishing rules of the common law doctrines of descent are the converse of those in this country." 4 KENT, COM. 411. "In no two states are the laws of descent identical." See 1 STIMSON, AMERICAN STATUTES, 389.

[18] Sinnickson *v.* Johnson, 17 N. J. L. 129, 146. See also Bonaparte *v.* Camden, etc. R. Co., Bald. Rep. 205, 220; Gardner *v.* Newburgh, 2 Johns. Ch. 162, 166–7. (Note the court's reference to the constitutions of Penn., Dela., Ohio, France, and the United States, although not binding on it, as indicative of an identification of natural law with the customary.) Bradshaw *v.* Rodgers, 20 Johns. Ch. 103, 106. Monongahela Navigation Co. *v.* United States, 148 U. S. 312, 325; and Chicago, etc. R. Co. *v.* Chicago, 166 U. S. 226, 237–8. But see *contra*, State *v.* Dawson, 3 Hill (S. C.) 100.

Courts accustomed to the *ex post facto* provision of the Constitution have conceived its principle inherently binding. Case of William Ross, 2 Pick. (Mass.) 165, 169; Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, 303–4. One court conceives the principle of the "contract clause" as laid down in The Dartmouth College Case to inhere "in the nature and spirit of the social compact" and bind the legislature quite apart from constitutional provisions. Regents of Univ. of Maryland *v.* Williams, 9 Gill & J. 365, 408. Another speaks of "*the sacredness of vested rights*" (italics in original) which "rest not merely upon the constitution, but upon the great principles of Eternal Justice." Benson *v.* Mayor, etc. of New York, 10 Barb. 223, 244–5. And note in the discussion of the necessity of service, in Borden *v.* State, 11 Ark. 519, 526 *et seq.*, the complete identification of common law, custom, and natural law.

[19] Nunnemacher *v.* State, 129 Wis. 190, 198–202. For further examples of natural law notions in the American cases, see Jeffers *v.* Fair, 33 Ga. 347, 365–7; *In re* Petition of Leach, 134 Ind. 665, 668, 34 N. E. 641, and cases collected in Note to Paxton's Case, Quincy's Rep. 528, n. 29; 1 THAYER, CASES ON CONSTITUTIONAL LAW, 53, n. 1; and in STIMSON, HANDBOOK TO LABOR LAW, 4, n. 4.

[20] Such is Judge Fowler's ideal lawyer. See Fowler, "The Future of the Common Law," 13 COL. L. REV. 595, 602–3. But note the danger of an unaired and untested philosophic hinterland. See Prof. Pound, "Scope and Purpose of Jurisprudence," 24 HARV. L. REV. 591, 608.

[21] For an account of such decisions with a discussion of their legal and social significance, see Prof. Pound, "Liberty of Contract," 18 YALE L. J. 454.

[22] See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 232–41; 1 WILLOUGHBY, CONSTITUTIONAL LAW, § 24, and cases cited.

York Court of Appeals.[23] The principal case deserves consideration only as an interesting legal anachronism.

THE AIR SPACE AS CORPOREAL REALTY. — Is the air space a corporeal part of the realty, and if so, may any portion of it exist as a separate freehold apart from the soil beneath it? A century ago Lord Ellenborough, explaining his decision by supposing a case of an aeronaut traversing the air in a balloon high over divers closes, held that trespass did not lie for a board projecting over the plaintiff's garden.[1] So also, shots passing at an average height of seventy-five feet have been treated as nuisances, rather than trespasses.[2] The tendency of the old English cases seems to be to treat overhanging cornices and the like on the same basis,[3] although that, perhaps, may be largely because the remedy of abatement was more desired than damages, and because the equitable jurisdiction to enjoin trespasses was slow in developing. The theory has accordingly been advanced that the air is only in the nature of an appurtenance to facilitate the enjoyment of the soil.[4]

It is clearly established, however, that there may be two or more distinct freeholds in a building over the same spot,[5] and when a building thus owned is destroyed, a question arises whether an owner of a portion of it who had no rights in the soil can claim the space formerly occupied by his property. It is evident that a mere lease for a term generally con-

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[23] "The question whether the act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions. The legislative power has no other limitation. If an act can stand when brought to the test of the Constitution the question of its validity is at an end, and neither the executive or judicial department of the government can refuse to recognize or enforce it. The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the *dicta* of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities." Bertholf *v.* O'Reilly, 74 N. Y. 509, 514.

[1] Pickering *v.* Rudd, 4 Camp. 219. See Bagram *v.* Karformah, 3 Beng. L. R. Orig. Jur. Civ. 18, 43.

[2] Clifton *v.* Viscount Bury, 4 T. L. R. 8.

[3] Baten's Case, 9 Co. 53 (*b*); Penruddock's Case, 5 Co. 100 (*b*), citing Rolf's case, Pasch. 25 Eliz. See Beswick *v.* Combdon, Moor 353. These cases were followed in 1845. Fay *v.* Prentice, 1 C. B. 828. Cases of overgrowing trees or vegetation seem *sui generis*. No action lies in England unless the damages are very substantial. See Crowhurst *v.* Amersham Burial Board, 4 Ex. D. 5, 10; Smith *v.* Giddy, [1904] 2 K. B. 448, 450. But the landowner may cut these obstructions at will. Lemmon *v.* Webb, [1895] A. C. 1.

[4] See Kuhn in 4 AM. J. INT. L. 109, 122–128, citing Corbett *v.* Hill, L. R. 9 Eq. 671; see also 71 CENT. L. J. 1.

[5] Loring *v.* Bacon, 4 Mass. 575; Cheeseborough *v.* Green, 10 Conn. 318; Rhodes Pegram & Co. *v.* McCormick, 4 Ia. 368; McCormick *v.* Bishop, 28 Ia. 233; Ottumwa Lodge *v.* Lewis, 34 Ia. 67; Keilw. 98, pl. 4; see Doe *v.* Burt, 1 T. R. 701, 703; Anon., 11 Mod. 7; Graves *v.* Berdan, 26 N. Y. 498, 501; Harris *v.* Ryding, 5 M. & W. 60, 71; Dugdale *v.* Robertson, 3 Kay & J. 695, 700; Smart *v.* Morton, 5 E. & B. 30, 47; Caledonian Ry. Co. *v.* Sprot, 2 Macq. 449, 450; Co. LIT. 48 (*b*); SHEP. TOUCH. 206; 2 WASHB., REAL PROP., 6 ed., 342. But *cf.* "Per le vend de l'auncestor, il fuit maintenāt disanexe del franktenemt, et vesty en l'achatour come chattel," Count D'Arundel's Case, Y. B. 11 HEN. IV, 32.